No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1947

W. CLAY RODGERS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER, W. CLAY RODGERS

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Respondent urges two propositions:

First: That the 1938 Agricultural Adjustment Act "set up a program under which equality of dealings among *all* cotton producers was fundamental. * * To adopt petitioner's view would make for inequality." Reply, p 9.

And then reasons from this, that (a) it would be inequitable to relieve petitioner of the payment of interest, because this would be violative of the fundamental principle of equality intended by this statute, and, (b), the established practice of this Court.

Second: That the penalties thereby imposed and here sought to be recovered are "not a true penalty

in the usual sense of that term," because they do not arise by reason of any prohibitive provision of said Act.

FIRST PROPOSITION

Taking up the first phase - (a) "equality":

Clearly this position is untenable by the very terms of the Act, itself. For, by these the nonconformer is onorated with both "forfeitures and penalties", which, obviously, here, is intended to be so burdensome as to be prohibitive, not to equalize.

The "forfeitures" consist of the loss of both, "payments under the Soil Conservation Allotment Act, • • and loans from the Commodity Credit Corporation • •." Reply, pp 4 and 5. (Sec. 1302 (c) and 1349, 7 USCA).

While the "penalty" exacted amounts, in reality, to about half the worth of the cotton—" • • 50 percentum of the loan for cooperators • •". Reply p 32 (7 USCA Supp. V, 1330 (a)).

So, instead of equalizing the two classes of producers — the cooperators with non-cooperators — as contended by Respondent, these provisions actually annihilate the non-cooperator, — and this, by the clear intent of Congress to penalize him to such an extent that he cannot operate.

To say this is not a "penalty" in the true sense of the word is to contravene common sense and good reason.

Therefore, we are forced to the conclusion, that we are here dealing with two subjects that are not only not favored, but on which interest is never allowed — "forfeitures and penalties", either before or after judgment. Orig. Pet., pp 6 and 7. (Petitioner begs

permission to omit a relisting of the authorities there cited, for the sake of brevity).

This also clearly demonstrates that there is no process or principle of equalization involved.

While both lower Courts, the Sixth and Fifth Circuits, concur in holding that interest is applicable after judgment, this is not conceded to be sound, where, as in this case, "forfeitures and penalties" are involved.

It is patent that both those Courts, as well as the Trial Court, assumed this to follow as a matter of course, under Sec. 811, 28 USCA, but this principle is seriously questioned, in fact, the cases cited (Orig. Pet., pp 6 and 7), expressly hold to the contrary.

And since Respondent takes the position that Sec. 811, Supra, "is entirely inapplicable," (Reply, p 10, Note) petitioner is clearly entitled to relief from interest even on the judgment.

This is especially true by reason of the fact, that Sec. 811 applies only to "judgments in civil causes."

In this connection, we call attention to Respondent's inconsistency in urging that it is entitled to six percent interest on the judgment, patently rested on State law, notwithstanding its contention that "the question of whether the United States is entitled to interest on the sums thus recoverable under the Act is entirely a matter of Federal, not local, law," (Reply, p 10), while there is no Federal Statute fixing the rate of interest, save and except Section 811, which provides interest only on "judgments in civil causes," not on those for a penalty, as here, necessarily as punishment.

Hence, thus reasoning, all interest should be eliminated.

Certainly, the Tennessee law, which Section 811 re-

quires shall be applied, if any at all, forbids the charge of any interest, either before or after judgment on penalties.

McCleary V. First National Bank, 109 Tenn. (1 Cates) p 142.

Moreover, this Court having repeatedly announced, that interest is purely a creature of statute,

> "Congress by enumerating the sums recoverable * * meant to preclude recovery of interest * *" Brooklyn Savings Bank V. O'Neil, 324 US 697, 716, 89, L. Ed. 1296, 1314.

Once more, unmistakably, to add interest to a penalty, is to increase the penalty, to that extent, beyond that fixed by law.

The next phase of this Proposition is, in simple language, that it is inequitable to allow petitioner to escape interest on "a sum certain." Reply, pp 8 and 9.

In the first place, the penalties sued for, in the original complaint involved numerous items, requiring extensive and complicated accounting, but the parties, in order to avoid this process, by long drawn out proof, reached an agreement and stipulated the total amount of the penalties involved. Record, pp 18 to 22. This is, therefore, not that class of liquidated amounts, on which, the cases cited by Respondent hold that Courts of Equity will sometimes allow interest, as a matter of right. The authorities cited in support apply wholly to cases where there is no controversy as to and the amount is fixed to start with, and, which, are purely civil and not criminal in nature.

SECOND PROPOSITION

In this regard, Respondent contends that the penalty here imposed is "not a true penalty in the usual sense of that term."

In addition to the treatise of this subject already submitted in petitioner's Original Petition (pp 8 to 11), we urge that this proposition has already been disposed of by this Court, contrary to Respondent's contention, in at least two of the more recent cases now urged upon the Court. These being Mulford V. Smith, 307 US 38, 83 L. Ed. 1092 and Wickard V. Filburn 317 US 111, 87 L. Ed. 122, in the latter of which, this Court expressly holds:

> "The stimulation of commerce is a use of the regulatory function *quite as definitely as prohibitions* or *restrictions* thereon."

In other words, any act of Congress which definitely evinces a disposition to forbid certain acts or conduct, is as mandatory as if expressly prohibited. That is, Congress does not have to say "Thou shalt not" or "It shall be unlawful" in order to impose a restriction and/or a penalty. The phraseology adopted is neither important nor controling, so long as the language used is a clear and definite restriction.

Respondent's efforts to compare the penalty here exacted with taxes, tariffs, excises and other forms of revenue levied by Congress, and to judgments for the recovery of money by reason of a breach of contract or transgression of personal rights, are wholly foreign to a judgment for penalties imposed for the purpose of a prohibition or a deterrent.

Such an exaction is clearly not "a debt which arises through operation of law," as held by the Lower Court. R., p 40.

All of Respondent's citations plainly fall under these classifications.

Respondent urges with great vigor, that this action to recover penalties should be likened to suits to recover taxes, revenues, and other stat tory demands, and cite a large number of cases of this nature in support of this contention. Cases of this purport have no characteristics common to either civil or criminal suits for penalties. This Court, in the case of Mulford V. Smith, 307, p 46, 83 L. Ed. p 1098, expressly holds that remedies applicable to tax cases do not apply to the subject matter of this cause.

Certainly, one of the tests of a true penalty is that laid down by this Court in the case of Helwig V. United States, 188 US, 605, 47 L. Ed. 614, where it is said, that when the imposition amounts to a substantial part of the actual value of the commodity involved, and not merely an amount laid for revenue or reasonable regulati n, it becomes a penalty for the purpose of prohibition.

This criterion is equally as emphatically set up in Sunshine Anthracite Coal Company V. Adkins 310 US 381, 401, 84 L. Ed., pp 12, 75.

It matters not that a civil suit is adopted to enforce this. It still retains its punitive or criminal nature.

U. S. V. Chonteau et al, 102 US, 603, 26 L. Ed. 246.

And, in conclusion, while petitioner does not want to be in the attitude of trying to argue with the Most High Court a matter already passed upon—his third proposition—non-enforceability of a suspended Act, during its suspension—he begs leave to call attention to the publicly announced or commonly known interim developments of a clear intention on the part of Congress to abandon both the policy of and the 1938 Agri-

cultural Adjustment Act, and to adopt in their place and stead those diametrically opposed thereto. That is, as now urged by the Department of Agriculture in lieu of a planned restricted production or scarcity, as contemplated by the 1938 Act, there be substituted a program of greatly increased production and an ever ready surplus, as expressly called for by the present Secretary of Agriculture, and significantly indicated for acceptance by the public hearings now being held throughout the country by a properly designated Congressional Committee, headed by Congressman Clifford Hope, for the very purpose of formulating legislation that will accomplish these desired results.

For these reasons the petitioner feels justified in most respectfully suggesting that this proposition be reconsidered.

Respectfully submitted,

W. Clay Rodgers
Petitioner